In the Supreme Court of the United States.

OCTOBER TERM, 1903.

THE DISTRICT OF COLUMBIA, appellant, v. ELIAS E. BARNES. } No. 484.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT ON THE MOTION TO DISMISS.

Strictly speaking, this is not a second appeal from the judgment of the Court of Claims of March 31, 1902. Under the decision of this court, no appeal could heretofore have been entertained. This appeal is brought under the provisions of the act of June 16, 1880 (21 Stat. L., 284), and the act of March 3, 1903 (32 Stat. L., 1070). An appeal, heretofore sought to be brought under the act of 1880, was suspended by the intervention of the act of June 6, 1900 (31 Stat. L., 572). This appears, properly enough, in the statement of the appellee, who makes this motion.

I.

THE DISTRICT OF COLUMBIA AS A MUNICIPAL CORPORATION.

The first section of the act of February 21, 1871 (16 Stat. L., 419), creates a municipal corporation by the name of "The District of Columbia, by

which name it is hereby constituted a body corporate for municipal purposes, and may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation, not inconsistent with the Constitution and laws of the United States and the provisions of this act."

The twenty-fifth section of the act provides that the judicial courts of said District shall remain as now organized until abolished or changed by Congress.

The powers and jurisdiction of the courts of the District are the same as exercised by the circuit and district courts of the United States. (2 Stat. L., 105; Rev. Stat. D. C., sec. 760 et seq.)

This legislation is that of the Congress of the United States, and must be considered in the light of the conclusion, so often announced by this court, that the United States possess complete jurisdiction, both of a political and municipal nature, over the District of Columbia.

> *Parsons* v. *District of Columbia*, 170 U. S., 45, 52.
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> *Wight* v. *Davidson*, 181 U. S., 371, 380, and cases cited.

The cases of *Barnes* v. *The District of Columbia*, and *Metropolitan Railroad Company* v. *The District of Columbia*, cited by the learned counsel for the appellee, were cases at common law; the one against the District for damages for personal injury in consequence of defective condition of

streets; the other an action of assumpsit, by the District against the company for work done, etc., in consequence of the failure of the company to comply with its duty under a statute, brought in the courts of the District, organized as above.

In the former case the court said:

> A municipal corporation, in the exercise of all its duties, including those most strictly local or internal, is but a department of the State. The legislature may give it all the powers such a being is capable of receiving, making it a miniature State within its locality. Again, it may strip it of every power, leaving it a corporation in name only; and it may create and recreate these changes as often as it chooses, or it may itself exercise within the locality any or all the powers usually committed to a municipality. We do not regard its acts as sometimes the agency of the State, and at others those of a municipality; but that, its character and nature remaining at all times the same, it is great or small according as the legislature shall extend or contract the sphere of its action. (*Barnes* v. *District*, 91 U. S., 540.)

In the latter case, the court said:

> It is undoubtedly true that the District of Columbia is a separate political community in a certain sense, and in that sense may be called a State; but the sovereign power of this qualified State is not lodged in the corporation of the District of Columbia, but in the Government of the United States. Its

> supreme legislative body is Congress. The subordinate legislative powers of a municipal character which have been or may be lodged in the city corporations, or in the District corporation, do not make those bodies sovereign. Crimes committed in the District are not crimes against the District, but against the United States. Therefore, whilst the District may, in a sense, be called a State, it is such in a very qualified sense. (*Metropolitan R. R. Co.* v. *District of Columbia*, 132 U. S., 1.)

The District of Columbia and the courts established therein are creations of Congress. It is not contended that the District, in matters of contract, has any sovereign rights and immunities. If suit had been brought against it in one of its courts, the same rules of procedure would have obtained as in suits between private parties; and the defenses, including limitation, could have been interposed. The right to sue and be sued and the forum in which suits could be maintained were within the absolute control of Congress. The suit at bar is not a suit brought under the statutes creating the municipality and the courts of the District. If it had been, the right to recover would have been barred by the statute of limitations.

II.

THE ACT OF JUNE 16, 1880 (21 STAT. L., 284), IS AN ACT CONFERRING JURISDICTION UPON THE COURT OF CLAIMS IN A PARTICULAR CLASS OF CASES; AND THE PROSECUTION, PRACTICE, HEARING, AND DETERMINATION OF THOSE CASES ARE EXCLUSIVELY WITHIN THE PROVISIONS OF THAT ACT.

The Court of Claims is a court created under constitutional provision, and is one of the inferior courts which Congress authorizes. (*U. S.* v. *Klein*, 13 Wall., 128, 138.) It has a general jurisdiction to render final judgments, by the acts of March 3, 1863 (12 Stat. L., 765), and March 3, 1887 (24 Stat. L., 505).

It has also had conferred upon it, by acts of Congress, jurisdiction in particular classes of cases and in many single claims for adjudication. For instance, the claim of the city of Carondelet, the French spoliation cases, the Pacific Railroad cases, the Cherokee Indian case, the Choctaw Indian case, the New York Indians, the La Abra and Weil Mexican award cases, and many individual cases growing out of collisions, etc.

The power of Congress to confer those jurisdictions is indisputable. Of such a character was the jurisdiction under which the suit at bar was instituted, conferred by the act of June 16, 1880.

By the first section of that act it was provided that the jurisdiction of the Court of Claims is hereby extended to, and it shall have original legal and equitable jurisdiction of, all claims now existing

against the District of Columbia arising out of contracts made by the late Board of Public Works and extensions thereof made by the Commissioners of the District of Columbia. * * * Said Court of Claims shall have the same power, proceed in the same manner, and be governed by the same rules in respect to the mode of hearing, adjudication, and determination of said claims as it now has in relation to the adjudication of claims against the United States.

By the second section it was provided: All such claims against the District of Columbia shall, in the first instance, be prosecuted before the Court of Claims by the contractor, his personal representatives or his assignee, in the same manner and subject to the same rules, so far as applicable, as claims against the United States are prosecuted therein, or to such other rules as the court shall prescribe. In any case, if before trial either party requests in writing a finding of facts by the court, there shall be the same right of appeal, either by the District of Columbia or by the claimants, and subject to the same rules and regulations as are prescribed by law for appeals on behalf of the United States, or claimants against the United States from the judgments of the Court of Claims.

By section third it is provided that the Attorney-General of the United States shall have authority, and it shall be his duty, to defend the District of Columbia against all such claims against said District of Columbia prosecuted in said Court of

Claims, and on appeal, in like manner as he is now by law required to defend the United States in said court, with the same power to interpose counterclaims and offsets against claims and defenses for frauds practiced or attempted and all other legal defenses, and with like power of appeal as in cases against the United States tried in said court.

By section four it is provided that all laws now in force relating to prosecutions of claims against the United States in the Court of Claims shall apply, as far as applicable, to the prosecution, practice, hearing, and determination of claims against the District of Columbia authorized to be prosecuted under the provisions of this act.

Under this act the claimant filed his petition and proceeded to trial. A judgment was rendered against him and in favor of the District upon a counterclaim. (22 C. Cls. R., 366.) A new trial was granted, and after proceedings, many of which were made subjects of exception, which will appear upon the trial of the merits, a judgment was entered in favor of the claimant. From that judgment an appeal was taken, which was dismissed by this court for want of jurisdiction, as appears in the statement of appellee. The present appeal was taken after the legislation, which also sufficiently appears in the statement of appellee. To avoid undue extension of this brief, I ask leave to thus refer to it.

These suits stand exactly upon the same authority as suits against the United States in the Court of Claims. They are not common law suits under the Constitution or the acts of Congress organizing the District and the courts thereof. They are brought by the consent of Congress; and in their prosecution and determination must be regulated by the act of permission to sue.

The act provides emphatically for the right of appeal. It was not only permitted, but it was made the duty of the Attorney-General to pursue that remedy. This statute, providing for the appeal, has never been repealed. The legislation upon the matter is, without a shadow of difference, the same as the legislation of the organic act of March 3, 1863, except that the provision making the granted right of appeal inoperative was in the belly of the act of 1863, while it was a subsequent enactment by Congress to the act of 1880. But in either case was the same manifest intention to preserve this invaluable right. And in both cases it was a pronounced essential condition to the operation of the remedy.

By the fifth section of the act of 1863 it was provided that either party may appeal to the Supreme Court of the United States from any final judgment or decree which may thereafter be rendered in any case by the Court of Claims wherein the amount in controversy exceeds $3,000, under such regulations as the Supreme Court may direct: *Provided*, That such appeal be taken

within ninety days after the rendition of such judgment or decree.

The seventh section provides that in all cases of final judgment by the Court of Claims, or, on appeal by the said Supreme Court, where the same shall be affirmed in favor of the claimant, the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment, certified by the clerk of the said Court of Claims, and signed by the chief justice, or in his absence by the presiding judge of the court.

The fourteenth section provides that no money shall be paid out of the Treasury for any claim passed upon by the Court of Claims till after an appropriation therefor shall be estimated for by the Secretary of the Treasury.

In *Gordon's case* (2 Wall., 561) this court decided that the authority given to the head of an Executive Department by necessary implication in the fourteenth section of the amended Court of Claims act, to revise all the decisions of that court requiring payment of money, denies to it the judicial power from the exercise of which alone appeals can be taken to this court. The cause was dismissed for want of jurisdiction.

This judgment was announced on March 9, 1865. On March 17, 1866, Congress passed the following repealing act: That the fourteenth section of an

act approved the 3d day of March, 1863, * * * be, and the same is hereby repealed; and from the final judgment, or decree, in all cases heretofore decided by the Court of Claims, of the character mentioned in the fifth section of said act of March 3, 1863, an appeal shall be allowed to the Supreme Court of the United States, at any time within ninety days after the passage of this act, except in such cases where the amounts found due by said court have been paid at the Treasury. (14 Stat. L., 9.)

Since the passage of this repealing act the Supreme Court has taken jurisdiction of appeals from the Court of Claims. At the December term, 1866, the Supreme Court promulgated the rules regulating appeals provided for by the fifth section of the act of 1863.

In *De Groot* v. *United States* (5 Wall., 419), this court, by Mr. Justice Miller, said: "This is the first appeal from the Court of Claims which we have been called upon to consider since the rules framed by this court regulating such appeals. * * * This case, having been decided before they (the rules) were published, comes under the provisions of the second rule." That rule provides that, in all cases in which judgments or decrees have heretofore been rendered, when either party is by law entitled to an appeal, etc.

The *De Groot case* was decided in the Court of Claims at the October term, 1864, long before the

repealing act was passed, and was appealed under the provisions of that act.

In this same case the court said:

> It is true that, ordinarily, when we seek for the foundation of this jurisdiction (of cases in which the United States is defendant) we look to the general laws creating the court, and defining cases of which it may have cognizance. But it is equally true that whenever Congress chooses to withdraw from that jurisdiction any class of cases which before had been committed to its control, as it has done more than once, it has the power to do so, or to prescribe the rule by which such cases may be determined. Its right to do this in regard to any particular case, as well as to a class of cases, must rest on the same foundation; and no reason can be perceived why Congress may not at any time withdraw a particular case from the cognizance of that court, or prescribe in such case the circumstances under which alone the court may render a judgment against the Government.

Reverting to the statutes set out on the brief of appellee—the statute of June 6, 1900, which this court has decided gives a power of supervision to the Secretary of the Treasury over the action of the Court of Claims; and the statute of March 3, 1903, which repealed that provision—we find small difference, as to appeals, from the legislation connected with the organic act of 1863.

The appellee insists, with great vehemence, he had a final judgment on the 31st day of March, 1902. But, at his invitation, this court decided that he did not have such final judgment and dismissed an appeal therefrom. In the opinion prepared by Mr. Chief Justice Taney in *Gordon* v. *United States* (Appendix 117 U. S., 696) is the following language:

> It will be seen by the sections above quoted that the claimant whose claim has been allowed by the Court of Claims, or upon appeal by the Supreme Court, is to be paid out of any general appropriation made by law for the payment and satisfaction of private claims; but no payment of any such claim is to be made until the claim allowed has been estimated for by the Secretary of the Treasury, and Congress, upon such estimate, shall make an appropriation for its payment. Neither the Court of Claims nor the Supreme Court can do anything more than certify their opinion to the Secretary of the Treasury, and it depends upon him, in the first place, to decide whether he will include it in his estimates of private claims, and if he should decide in favor of the claimant, it will then rest with Congress to determine whether they will or will not make an appropriation for its payment. Neither court can by any process enforce its judgment; and whether it is paid or not does not depend on the decision of either court, but upon the future action of the Secretary of the Treasury and of Congress.

And further, the Chief Justice said that the circumstance that one (the Court of Claims) is called a court and its decisions called judgments can not alter its character nor enlarge its power. (See also *District of Columbia* v. *Eslin*, 183 U. S., 62, 65; *District of Columbia* v. *Barnes*, 187 ib., 637.)

So, then, at the time of this so-called judgment, Barnes had no judgment at all. What then becomes of the doctrine of vested rights so earnestly and feelingly invoked by the learned counsel? If the appellee could have any such rights by virtue of the regular judgment of a court having jurisdiction to render such, it will hardly be contended this action of the Court of Claims was such a judgment. (*Calder* v. *Bull*, 3 Dall., 186.) If he had a judgment at all it was by virtue of the remedial provisions of the repealing act; and if that is so there can be no question as to right of appeal, if taken within the prescribed ninety days.

III.

BUT IF THIS IS A RETROSPECTIVE STATUTE, SUCH LEGISLATION IS WITHIN THE COMPETENCY OF CONGRESS.

I do not think it necessary, or proper even, to review the authorities cited by counsel for appellee, as bearing upon the legislative right to grant an appeal by way of review in cases like the one at bar. Those cases are either where the legislature attempted to directly grant an appeal or new trial in a cause between private citizens, or dispensing with a general law in favor of a particular case, or

passing a law in violation of the provisions of a State constitution.

The passage of a law affecting remedies in a court where permission to prosecute causes is based altogether upon the terms of special acts of Congress is another thing, and the authorities are not applicable.

As was said by Mr. Circuit Justice Miller in *Schenck* v. *Peay* (Wool., 175; Fed. Cas., No. 12451):

> The law concerning retrospective statutes has been so much discussed in this country and in England that it would be an affectation of learning to cite authorities upon the subject. It is undoubtedly within the power of Congress to pass retrospective statutes which do not come within the definition of ex post facto laws. As this prohibition of the Constitution relates exclusively to criminal laws, it does not affect the power of Congress to pass such a law in the matter before us.

And in *Stephens* v. *The Cherokee Nation* (174 U. S., 445, 477), Chief Justice Fuller, delivering the opinion of the court, said:

> The contention is that the act of July 1, 1898, in extending the remedy by appeal to this court was invalid because retrospective, an invasion of the judicial domain, and destructive of vested rights. By its terms the act was to operate retrospectively, and as to that it may be observed that while the general rule is that statutes should be so construed as to give them only prospective

operation, yet where the language employed expresses a contrary intention in unequivocal terms, the mere fact that the legislation is retroactive does not render it necessarily void.

And while it is undoubtedly true that legislatures can not set aside the judgments of courts, compel them to grant new trials, order the discharge of offenders, or direct what steps shall be taken in the progress of a judicial inquiry, the grant of a new remedy by way of review has been often sustained under particular circumstances. (*Calder* v. *Buel*, 3 Dall., 386; *Sampeyreac* v. *United States*, 7 Pet., 222; *Freeborn* v. *Smith*, 2 Wall., 160; *Garrison* v. *New York*, 21 Wall., 196; *Freeland* v. *Williams*, 131 U. S., 405; *Essex Public Road Board* v. *Skinkle*, 140 U. S., 334.)

This legislation interferes with no rights of the appellee. He went into the Court of Claims with full knowledge that an appeal to the Supreme Court was assured to both himself and the District. That right has never been taken away. At the most it can be said to have been only in abeyance.

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